MAY 31 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1949.

No. [redacted]102

JAMES A. SULLIVAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York and for Stay of Execution, and Supporting Brief.

FRANCIS A. MCGURK,
Attorney for Petitioner,
42 Broadway,
New York City.

THE REPORTER COMPANY, INC., New York City—1950

Index.

	Page
Constitutions	ii
Statutes	iii
Table of Cases Cited	iv
Other Authorities	vi
Petition for Writ of Certiorari	1
Statement of Case	1
Jurisdiction	4
Statutes Involved	5
Questions Presented	6
Reasons Relied Upon for Allowance of the Writ	7
Conclusion	8
Brief in Support of Petition	9
Opinions Below	9
Jurisdiction	9
Specifications of Error	9
Summary of Argument	11
Argument	14
I. The Trial Court lacked jurisdiction because of disqualification of the Trial Judge by §14 of the Judiciary Law	14
A. Importance of the question	14
B. Exhaustion by petitioner of State remedies	14
C. Lack of jurisdiction in the County Court in this case	14
D. Legal effect of retention of jurisdiction	16
E. Right to trial by a competent Court was abridged	17
II. The judgment of conviction rests upon perjury, coerced and knowingly used, and should not be permitted to stand	18

Page

A. Importance of the question 18

B. Perjury was committed by the witness Balog 18

C. Perjury was coerced and knowingly used by the State 19

III. Balog, chief witness of the State, was impeached in violation of the statutes, and is also an uncorroborated accomplice, all of which leaves the verdict unsupported by evidence on the charges of filing and uttering, and goes to his credibility on all counts of the indictment 21

A. Importance of the question 21

B. There is no substantive evidence of guilt of filing and uttering under counts first and third 21

C. The impeachment in this case was in violation of the statutory methods prescribed therefor 22

D. Lack of due process and denial of equal protection of the laws because of impeachment 23

E. Denial of the equal protection of the laws, §399 of the Code of Criminal Procedure 23

Conclusion 25

CITATIONS.

	Page
U. S. Constitution, 14th Amendment, §1	4-7, 10-11, 16-17, 21, 23
N. Y. Constitution, Article 6, §11	17
N. Y. Constitution, Article 1, §6	21

STATUTES.

U. S. C. A., Title 28, §1257 (3)	4
U. S. C. A., Title 28, §455	14
Code of Criminal Procedure, §8-a	4-7, 10, 13, 22-24
Code of Criminal Procedure, §399	6, 7, 11, 13, 24
Code of Criminal Procedure, §39	14
County Law, §230 (3)	2, 15
County Law, §230 (1)	2, 15
County Law, §200 (1)	2
County Law, §200 (4)	17
County Law, §202	17
Civil Practice Act, §343-a	4-7, 10, 13, 22-24
N. Y. Laws 1847, Chapter 280, §81	15
Penal Law, §2051	2
Penal Law, §440	2
Penal Law, §887	2
Penal Law, §881	2
Penal Law, §1620 (1)	21
Penal Law, §1620-a	21
Penal Law, §1622	21
Penal Law, §1624	21
Penal Law, §1626	21
Penal Law, §1627	21
Penal Law, §1627-a	21
Revised Statutes (N. Y., 4th ed.), 1852, v. 3, p. 463, §8	15
Reviser's Notes to N. Y. Laws in v. 3 R. S. (N. Y. 1828-1835), p. 694, §2	15

CASES.

	Page
Ashcraft v. Tennessee, 322 U. S. 143	23
Bullard v. Pearsall, 53 N. Y. 230	5, 23
Becker v. Koch, 104 N. Y. 394	5
Baltimore Mail S. S. Corp. v. Fawcett, 269 N. Y. 379	15
Chambers v. Florida, 309 U. S. 227	23
Cassel v. Texas, decided April 24, 1950	17
Conrad v. Griffey, 52 U. S. 480	22
Crawford v. Nilan, 289 N. Y. 444	5
Darling v. Pierce, 15 Hun 542	16
Darr v. Burford, 339 U. S. 200	14
Davis v. Seaward, 85 Misc. 210	17
Ex Parte Virginia, 100 U. S. 339	17
Eugenie Loeb v. Nassau El. R. R., 240 App. Div. 912	15
Ex Parte Hawk, 321 U. S. 114	14
Ex Parte Reid, 100 U. S. 13	15
Fellows v. Mayor, 8 Hun 484	17
Frank v. Magnum, 237 U. S. 309	15
Hanrahan v. N. Y. Edison Co., 238 N. Y. 194	22
Hogan v. General Sessions, 296 N. Y. 1	14
Hubbell v. Harbeck, 54 Hun 147	16
Hysler v. Florida, 315 U. S. 411	14, 21
Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278	4, 17
Johnson v. Zerbst, 304 U. S. 458	14
Keefe v. Third Nat. Bk. of Syracuse, 177 N. Y. 305	15, 17
Lewis v. Branthwaite, 2 B. & Ad. 437	16
McLaren v. Charrier, 5 Paige Ch. 530	15
Matter of Knickerbocker T. Corp. v. Sheila Lynn Inc., 172 Misc. 1015, affd. 259 App. Div. 992	16
McMaster v. Gould, 240 N. Y. 379	16
Matter of City of Buffalo, 139 N. Y. 422	16
Moore v. Dempsey, 261 U. S. 86	16

Page

Mooney v. Holohan, 294 U. S. 103 21
Malinski v. New York, 324 U. S. 401 23
Matter of Roge v. Valentine, 280 N. Y. 268 ..... 5, 23
Neal v. Delaware, 103 U. S. 370 17
Oakley v. Aspinwall, 3 N. Y. 547 15
Palko v. Connecticut, 302 U. S. 319 16
Paterno v. Lyons, 334 U. S. 314 14
Pennenkamp v. Florida, 328 U. S. 331 23
Pennoyer v. Neff, 95 U. S. 714 16
People v. Bork, 96 N. Y. 188 16
People v. Edwards, 282 N. Y. 413 22
People v. Gillette, 126 App. Div. 665 20
People v. Glass, 191 App. Div. 483 21
People v. Hagedorny, 272 App. Div. 830 22
People v. Haas, 105 App. Div. 119 ..... 15, 16
People v. Jung Hing, 212 N. Y. 393 5
People v. Katz, 209 N. Y. 311 ..... 5, 22
People v. Kress, 284 N. Y. 452 25
People v. Markan, 123 Misc. 689 20
People v. Nuzzo, 294 N. Y. 227 25
People v. O'Neil, 109 N. Y. 251 ..... 22, 24, 25
People v. Purtell, 243 N. Y. 273 5
People v. Patrick, 183 N. Y. 52 16
People v. Rathbun, 21 Wend. 509 17
People v. Romano, 279 N. Y. 392 5
People v. Robinson, 273 N. Y. 438 ..... 5, 23
People v. Sellinger, 265 N. Y. 149 22
People v. Sullivan, 275 App. Div. 956 9
People v. Sullivan, 300 N. Y. 696 9
People v. Sullivan, 309 N. Y. 739 9
People v. Swersky, 216 N. Y. 471 25
People ex rel. Battista v. Christian, 249 N. Y. 314 17
People ex rel. Childs v. Extrady, Trial Term, 228 N. Y. 463 16
People ex rel. Pond v. Trustees, 4 App. Div. 399 .... 15, 16

Page

People ex rel. Roe v. Suffolk Com. Pleas, 18 Wend. 550 15
People ex rel. Wachowicz v. Martin, 293 N. Y. 361 14
Pyle v. Kansas, 317 U. S. 213 21
Robb v. Hackley, 23 Wend. 50 22
Spielman Motor Co. v. Dodge, 295 U. S. 89 17
Schneiderman v. U. S., 320 U. S. 118 16
Screws v. U. S., 325 U. S. 91 4
Snyder v. Massachusetts, 291 U. S. 97 16
Sharkey v. Thurston, 268 N. Y. 123 ..... 14, 15, 16, 17
Shea v. Export S. S. Corp., 253 N. Y. 17 15
Ten Eick v. Simpson, 11 Paige Ch. 177 16
Thellusson v. Rendlesham, 7 H. L. Cas. 429 16
Twining v. New Jersey, 211 U. S. 78 16
U. S. v. Norris, 300 U. S. 564 20
Virginia v. Rives, 100 U. S. 313 17
Whitney v. Post, 8 Paige Ch. 36 16
Wigand v. Dejonge, 8 Abb. N. C. (N. Y.) 260 16
Wicks v. Monihan, 130 N. Y. 232 16
Windsor v. McVeigh, 93 U. S. 274 15
Yick Wo v. Hopkins, 118 U. S. 356 17
Zambetti v. Garton, 113 N. Y. Sup. 804 16

OTHER AUTHORITIES.

N. Y. Legislative Manual, 1945, p. 658 2
N. Y. Legislative Manual, 1946, pp. 1005, 1014 ..... 2, 15
N. Y. Legislative Manual, 1947, p. 993 ..... 2, 15
56 Yale Law Journal 605, 624 (Apl., 1947) 16
15 California Law Review 263 (Mar., 1927) 16
Wigmore on Evidence, 3d ed., §§1128, 1129 ..... 20, 23

Supreme Court of the United States

OCTOBER TERM, 1949.

JAMES A. SULLIVAN,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF NEW YORK.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York and for Stay of Execution of Judgment.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a writ of certiorari to the Court of Appeals of the State of New York, being the highest court of the State of New York, be issued to review the final order and judgment of said Court (fols. 4069-4076), rendered and filed March 3, 1950 [upon which a final judgment was entered in the office of the Clerk of the County of Westchester on March 13, 1950—fols. 4078-4083], which affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered on June 20, 1949 (fols. 4048-4053), affirming a judgment of the Trial Court, the County Court of Westchester County, entered June 14, 1948 (fols. 124-128). Since March 15, 1950, petitioner has been serving the sentence (fols. 126-127, 3743-3744).

Statement of Case.

Petitioner was convicted May 17, 1948 (fols. 124-128, 3727-3729), upon an indictment charging (1) knowingly procuring or offering for filing in the office of the Clerk of Westchester County on June 4, 1945, of a false and forged certificate of doing business by Maritime Oil Company, which certificate, if genuine, might be filed there (§2051, Penal Law, McKinney's Con. Laws N. Y., v. 39, fols. 7-16; see §440, Penal Law); (2) forging the name of C. J. Arnold to the certificate (§887, *id.* sup., fols. 17-18); and (3) uttering said certificate by filing thereof (§881, *id.* sup., fols. 19-22). The verdict was several and not general (fols. 3727-3728).

The Trial Judge (fol. 60), before his elevation to the bench on January 1, 1946, by appointment of the Governor, was District Attorney of Westchester County (County Law, McKinney, v. 11, §230 [3], N. Y. Leg. Manual 1946, p. 1005, *id.* 1945, p. 658, County Law, §200 [1]). In November, 1946, he was elected County Judge (County Law, §230 [1], N. Y. Leg. Manual 1947, p. 993).

Having been attorney and counsel for the State in this case, he was disqualified to sit therein by §14 of the Judiciary Law (McKinney, v. 29). April 26, 1948, motion was made to withdraw a juror and to declare a mistrial, and denied, and jurisdiction retained despite the facts upon which the motion was made were admitted (fols. 59-60, 743, 745-755). The Trial Judge also denied a motion to inspect the Grand Jury minutes and disallowed a demurrer to the indictment (fols. 25-27, 31-54, 59).

The indictment is the result of an investigation begun in March, 1945 (fol. 749), by the Trial Judge, then District Attorney, and pursued by him for nine months, of an application for a telephone for Maritime Oil Company, made by one McGeory for Arthur Arnold who occupied

a room in the Labor Temple, Yonkers, as tenant of McGeory (fols. 1328, 1334, 1335; Exhibits 19, 20, fols. 3820-3828, 1359-1420, 1469-1479). As evidence that Maritime was doing business, the certificate was filed by someone not identified and a certified copy thereof left with the telephone company (fols. 259, 326, 816-818).

Reports of suspicion of the telephone company that the telephone would be used for bookmaking purposes were made to the District Attorney in April, 1945 (fols. 401-406, 1463-1465, 1473-1474, 392, 393, 402, 406, 416, 417, 421, 422, 423-425, 2419-2429, 211, 277-279). In addition, he also had the records of the telephone company (fols. 383, 384). On October 24, 1945, the District Attorney requested the telephone company to furnish him the name and address of the (*sic*) owner of the Ben Weiss telephone at 307 Walnut Street, Yonkers (Exhibit K, fols. 3964-3966, 2417, 2424, 2432, 2433-2435). That telephone was found in the room of Arnold, occupied by him as tenant of McGeory (Exhibit K, *supra*, fol. 1354: Exhibit 20, fols. 3826-3828, 639, 642-645, 656). Arnold had another man working with him (fols. 1412, 1445-1447; Exhibit J, fols. 3958-3960, 2421; Exhibit K, fols. 3964-3966, 2426-2434, 715, 731, 736-737).

Balog, chief factual witness for the State, signed the certificate, although he did not appear before or acknowledge it to the Commissioner of Deeds (Exhibit 23, fols. 3832-3834, 788, 866, 793-794). He was pretty sure that he took the certificate to the County Clerk, "it could not be otherwise" (fol. 795). He is unable to account for C. J. Arnold written by the Clerk on the back of the certificate, as the office practice is to ask for the name of the person presenting documents to be filed and to endorse the name thus given thereon (Exhibit 23, fols. 3832-3834, 961-962, 817-820). Then he recanted his testimony as to filing, stating the information that he had

filed it was given to him by the District Attorney (fols. 879-882, cf. 795). He testified before the councilmanic inquiry in Yonkers in July, 1947, but was not asked about the filing, and he testified before the Grand Jury in this case in October, 1947 (fols. 3716, 878-882). Then Balog recanted his recantation (fols. 938, 956-959). Therein lies perjury, and his impeachment, contrary to the statute (Code Crim. Proc., §8-a; Civil Pract. Act, §343-a). The second perjury (fol. 959) was admitted as clarification (fol. 959), which in the context is meaningless, for it is a flat, mendacious contradiction, under oath, taken from the quadripartite conference, which was not under oath, with the District Attorney, the witness, his wife and his attorney, before his Grand Jury appearance (fols. 879-882). Balog, obviously, was "refreshed" overnight (fols. 965-970, 974, 975). Balog received immunity for his testimony, and the District Attorney conceded that he was an accomplice (fols. 3523-3525, 3526, 882, 883, 3484).

Jurisdiction.

Jurisdiction of this Court is invoked under §1257 (3) of Title 28, U. S. C. A.

See also:

Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278, 284, *et seq.*
Screws v. U. S., 325 U. S. 91, 115, *et seq.*

Disqualification of the Trial Judge under §14 of the Judiciary Law was raised during the trial by motion to withdraw a juror and to declare a mistrial (fols. 745-755), and in the Court below assigned as error and deprivation of due process under the Fourteenth Amendment. Perjury and its use knowingly are manifest in the record, as is impeachment by the State of the crucial,

factual witness called by the State, contrary to the statutes. (§8-a, Code Crim. Proc.; §343-a, Civil Prac. Act.) Those questions were raised in the trial by objection and exception (fols. 957-960; cf. fols. 975, 815-819, 878-882, 961-962, 965-970, 974-975, 979, 3716), and by motions to dismiss (fols. 2396-2402, 3332), assigned as error below and as deprivation of due process under the Fourteenth Amendment.

Statutes Involved.

Judiciary Law of New York, §14, which provides in part:

> "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel * * *"

Section 8-a of the Code of Criminal Procedure, provides:

> "In addition to impeachment in the manner now permitted by law, any party may introduce proof that a witness has made a prior statement inconsistent with his testimony, irrespective of the fact that the party has called the witness or made the witness his own, provided that such prior inconsistent statement was made in any writing by him subscribed or was made under oath."

Section 343-a of the Civil Practice Act is *in haec verba* as §8-a, C. C. P.

The addition mentioned in the opening sentence of §8-a, *supra*, is defined in *People v. Katz*, 209 N. Y. 311, 338; *People v. Jung Hing*, 212 N. Y. 393, 401, *et seq.*; *Crawford v. Nilan*, 289 N. Y. 444, 450, 451; *People v. Romano*, 279 N. Y. 392; *Matter of Roge v. Valentine*, 280 N. Y. 268, 276-277; *People v. Purtell*, 243 N. Y. 273, 280, 281; *People v. Robinson*, 273 N. Y. 438; *Bullard v. Pearsall*, 53 N. Y. 230; *Becker v. Koch*, 104 N. Y. 394, 401.

§399, Code of Criminal Procedure:

> "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

Questions Presented.

1. Jurisdiction of this case was lost by the County Judge because of the disqualification of the presiding Judge by §14 of the Judiciary Law. Retention of jurisdiction deprived petitioner: (a) of due process of law in that (1) he could, and did, not have a trial, let alone a fair trial; (2) rendered the proceedings *coram non judice* and a nullity; (b) of the equal protection of the laws; and abridged his right in this case to be tried in a court having jurisdiction in that he was forced by the State to try it in a court that lacked jurisdiction in this case. All in violation of his rights under the Fourteenth Amendment.

2. The judgment of conviction should not be permitted to stand resting, as it does, upon perjured testimony, knowingly used by the State, and material upon all counts of the indictment, depriving petitioner of due process under the Fourteenth Amendment.

3. Petitioner was deprived of due process and the equal protection of the laws in violation of his rights under the Fourteenth Amendment, in that, in violation of §§8-a and 343-a of the Code of Criminal Procedure and the Civil Practice Act, respectively, the chief factual witness, called by the State, was impeached by the State other than

by a statement subscribed by him or made under oath. Impeaching evidence was admitted (fol. 959, cf. fols. 795, 882), which under the rule (cases cited under statutes involved, *supra*, pp. 5, 6), stamped the witness impeached as an accomplice. But the Court later, in the charge to the jury, ruled complicity out as matter of fact and law (fols. 3691-3698, 3708). This is a deprivation of due process and equal protection of §399 of the Code of Criminal Procedure requiring corroboration of an accomplice.

Reasons Relied on for Allowance of the Writ.

Lack of jurisdiction in the Trial Court rendered the whole proceeding a sham and a nullity and the sentence of petitioner rises no higher.

Petitioner was denied due process of law, in that he could, and did, not have a fair trial or a trial at all. Also, he was denied the equal protection of the laws, in that cognate cases where the Trial Judge was disqualified, jurisdiction was held not to have attached, but otherwise in the case at bar. All in violation of his rights under the Fourteenth Amendment.

Judgment of conviction rests upon perjured testimony, knowingly used by the State in this case, which was necessary and material to conviction upon all counts of the indictment; in violation of petitioner's right to due process under the Fourteenth Amendment.

Petitioner was further deprived of due process and the equal protection of the laws in violation of his rights under the Fourteenth Amendment, in that, in violation of §§8-a and 343-a of the Code of Criminal Procedure and the Civil Practice Act, respectively, the chief factual witness of the State, called by it, was impeached by it, in a manner other than by a written statement subscribed by the witness or made by him under oath. And

was further deprived of due process and equal protection of the laws, in that the chief factual witness of the State was permitted to testify to facts which, under the law, stamped him indelibly as an accomplice (fol. 959; cases cited under statutes involved pp. 5, 6), and yet the Court charged the jury that the witness was not an accomplice as matter of fact or law (fols. 3691-3698, 3708).

Conclusion.

The writ should issue.

Respectfully submitted,

JAMES A. SULLIVAN,
Petitioner.

FRANCIS A. MCGURK,
Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1949.

JAMES A. SULLIVAN,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF NEW YORK.

Brief in Support of Application for Writ of Certiorari to the Court of Appeals of the State of New York and for Stay of Execution.

Opinions Below.

The Trial Court rendered no opinion, except a memorandum denying a motion to inspect the Grand Jury minutes and disallowing a demurrer to the indictment (fols. 52-54).

In the Appellate Division there were three memoranda opinions, one concurred in by three Justices and one each by two dissenting Justices (275 App. Div. 956; fols. 4060-4065).

The Court of Appeals rendered no opinion (300 N. Y. 696, fols. 4069-4076). On April 6, 1950, application for re-argument or to amend the remittitur was denied without opinion (300 N. Y. 739).

Jurisdiction.

See petition, pages 4 and 5, *supra*.

Specification of Errors.

It was error for the Trial Judge to have denied the application for a mistrial and to have retained jurisdiction after disqualification by §14 of the Judiciary Law had been raised and litigated on the trial, and the facts upon which the application was made had been admitted and affirmed after review below (fols. 745-755).

It was error to hold that petitioner had a trial by jury or even a fair trial as part of due process under the Fourteenth Amendment, a constituent part of the court, the presiding Judge, being disqualified; and that his right or privilege to a trial by a court having jurisdiction was not abridged in violation of his right thereto under the Fourteenth Amendment.

It was error to hold that petitioner was accorded equal protection of the laws under the Fourteenth Amendment, in that applicability of §14 of the Judiciary Law disqualified presiding Judges in cognate cases, but was denied to him.

It was error to hold that petitioner was accorded equal protection of the laws and due process under the Fourteenth Amendment in that, one Balog, chief factual witness for the State and called by it, was permitted to be impeached by the State (fols. 956-959 cf. 879-882), in a manner that violated §§8-a and 343-a of the Code of Criminal Procedure and the Civil Practice Act, and the impeaching testimony used as substantive evidence to convict.

It was error to hold that said Balog did not commit perjury in wilfully testifying falsely to a material fact, the filing the certificate (opp. p. 4, fols. 10-12, 795 cf. fols. 3716, 878, 882). Then to permit recantation thereof (fol. 959). And further, that said perjury was not coerced, and knowingly used, by the State.

It was error to hold that said Balog was not an accomplice whose testimony under §399 of the Code of Criminal Procedure had to be corroborated, and to have admitted his testimony upon the only theory upon which it could be admitted, which stamped the witness indelibly as an accomplice, and then, to instruct the jury that the witness was not an accomplice as matter of fact and law (3691-3698, 3708), thus depriving him of due process and the equal protection of the laws under the Fourteenth Amendment.

Summary of Argument.

Holding that having formerly been attorney and counsel for the State in this case did not divest the County Court of Westchester County of jurisdiction because of the disqualification of the Trial Judge by §14 of the Judiciary Law, obviously is important. The quest for jurisdiction must be found and settled at the outset of any trial, for it is the foundation upon which the Court may proceed to judgment. Lack of jurisdiction renders any trial a nullity. Disqualification, in this case, deprived the court of a constituent thereof, a Trial Judge.

In numerous prior cases, §14 of the Judiciary Law has been held to prevent jurisdiction from attaching. It could be raised at any time, is not waived and jurisdiction could not be conferred. The provisions of §14 are not rules of procedure and do not invest the Judge with discretion. They are a barrier to jurisdiction. This case plainly shows lack of jurisdiction and due process because thereof. By enforcing the law as it was enforced here, petitioner's right or privilege to be tried by a court having jurisdiction was abridged, and there was denied him equal protection of the laws.

The perjury here is manifest from the record, as is coercion, and the knowing use of testimony thus elicited, by the State. Conviction rests upon it as does the credibility of the perjurer. Without his testimony, the case of the State collapsed, for there is, without it, a palpable lack of evidence connecting petitioner with filing and uttering the certificate of Maritime Oil Company, charged in the first and third counts of the indictment; and the perjurer would not be credible as a witness upon the second count (cf. fols. 4064-4065).

Interlaced factually, though not legally with the perjury, is the impeachment of the perjurer and his complicity in the crimes charged. As to filing and uttering, reciprocal under the first and third counts of the indictment, the witness was never interrogated as to receiving the certificate to be filed, and its filing by him, before the perjury. He testified on cross examination that the information that he had *qua* filed the certificate was given to him by the District Attorney (fol. 882). That testimony is the gatepost of the perjury, the collapse of the case of the State, and the impeachment of the witness (fols. 957-958; cf. fol. 795). The following day, he was recalled by the State, ostensibly for another purpose than perjury (fols. 938-940), and while the witness did not deny in terms his previous testimony (fol. 882), he did in effect, with an avalanche of words (fol. 959) embodying in direct discourse what had been given him in indirect discourse by the District Attorney in rehearsing him for his Grand Jury appearance in this case (fols. 882, 878-881). Thereby he mendaciously, flatly contradicted his testimony at folio 882.

Prior to the trial in a city inquiry in Yonkers, N. Y. (fol. 794), where the witness was represented by his own attorney and since had been, he was not asked about filing the certificate (fol. 3716).

Overnight preceding the day of his recantation, he had spoken to four members of the staff of the District Attorney (fols. 965-970, 974, 975). It is obvious that he was "refreshed," coerced in the perjury, and it and the witness knowingly used by the State to accomplish the conviction. This is clearly lack of due process.

When he perjured himself, the witness was impeached (fols. 957-958). He had confessed under oath that he had made his own the answer given him by the District Attorney (882), which was unsubscribed and unsworn, and the impeaching evidence was elicited in violation of the statutes (§§8-a, Code Crim. Proc., and 343-a, Civ. Prac. Act). No mention is made of his having testified before the Grand Jury on the point (*cf.* fols. 953-954,957-959). That testimony would have been under oath, and competent if it existed in fact.

The Court charged that the witness was not an accomplice either as matter of law or fact (fols. 3691-3698, 3708). But, upon the only theory that the impeaching testimony could be admitted as evidence, namely, that he had made prior consistent statements when motives to falsify were not present, which is the addition to §§8-a and 343-a of the Code of Criminal Procedure and the Civil Practice Act, respectively, the witness is stamped as an accomplice (§399, Code Crim. Proc.), and must be corroborated. There is no showing that he made prior consistent statements, nor that he was actuated by any motives other than those that actuated him as far back as the summer of 1947 (fols. 878, 883-884). The impeaching testimony was unsubscribed and unsworn (fol. 959). Therefore, petitioner was deprived of due process, in that he did not have a fair trial and also was denied the equal protection of the laws, §§8-a, 399 and 343-a, *supra*. (See cases cited under statutes involved, *supra*, pp. 5, 6.)

ARGUMENT.

I.

The Trial Court lacked jurisdiction because the Trial Judge was disqualified by Section 14 of the Judiciary Law, having been attorney and counsel for the State in this case.

A. Importance of the question.

The instant case presents the quest for jurisdiction in a setting novel to this Court, although there is a cognate federal statute (U. S. C. A. Tit. 28, §455), and the question is of primary importance in the true administration of the law.

B. Exhaustion of State remedies.

The infirmities are not present here that appeared in *Ex parte Hawk,* 321 U. S. 114, *Hysler v. Florida,* 315 U. S. 411, and *Darr v. Burford,* 339 U. S. 200. This record manifests the errors, committed on the trial where they were litigated *coram judice* and reviewed below on appeal (*Paterno v. Lyons,* 334 U. S. 314, 318, 319). Neither error *coram nobis* nor *habeas corpus* is available here (*Hogan v. Genl. Sessions,* 296 N. Y. 1, 6; *People ex rel. Wachowicz v. Martin,* 293 N. Y. 361, 364, 366-367; *Matter of Morhaus, id.* 131). Unless this Court will intervene, petitioner is remediless.

C. Lack of jurisdiction in the County Court in this case.

General jurisdiction of the County Court under Section 39 of the Code of Criminal Procedure is not challenged. Its jurisdiction in this case is (*Sharkey v. Thurston,* 268 N. Y. 123, 126; *Johnson v. Zerbst,* 304 U. S. 458, 468;

Frank v. Magnum, 237 U. S. 309, 329; *Windsor v. McVeigh,* 93 U. S. 274, 282-283; *Ex parte Reid,* 100 U. S. 13, 23) because of Section 14 of the Judiciary Law, which provides in part:

> "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel * * *."

In syncopated form, it appears first in Laws, New York, 1847, Chapter 280, Section 81 (2 R. S., 4th ed. 1852, p. 463, §8; Rev. Notes to Chap. III, tit. I, Laws N. Y. in 3 R. S. N. Y. 1828-1835, p. 694, §2).

It applies to civil and criminal cases (*People v. Haas,* 105 App. Div. 119, 120).

The Trial Judge (fol. 60) was District Attorney of Westchester County before his elevation to the bench by appointment of the Governor on January 1, 1946 (County Law, §230 [3], N. Y. Leg. Manual, 1946, p. 1005; *id.* 1945, p. 658). In November, 1946, he was elected County Judge (County Law, §230 [1], N. Y. Leg. Manual, 1947, p. 993).

Having raised the jurisdictional point which was litigated on the trial (fol. 754) and which could be raised at any time, is never waived and jurisdiction could not be conferred (*Baltimore Mail S. S. Corp. v. Fawcett,* 269 N. Y. 379; *Shea v. Export S. S. Corp.,* 253 N. Y. 17), nevertheless jurisdiction was retained over objection (fol. 754). The result is that the whole trial is *coram non judice, ab initio,* a fiction and a nullity (*Oakley v. Aspinwall,* 3 N. Y. 547; *Keefe v. Third Nat. Bank of Syracuse,* 177 N. Y. 305, 311, 313; *Sharkey v. Thurston, supra; People v. Haas,* 105 App. Div. 119; *Eugenie Loeb v. Nassau Electric R. R. Co.,* 240 App. Div. 912; *McLaren v. Charrier,* 5 Paige Ch. 530, 532; *People ex rel. Roe v. Suffolk Com. Pleas,* 18 Wend. 550; *People ex rel. Pond v. Trustees,* 4

App. Div. 399; *Darling v. Pierce,* 15 Hun 542; *Hubbell v. Harbeck,* 54 Hun 147; *Whitney v. Post,* 8 Paige Ch. 36; *Ten Eick v. Simpson,* 11 Paige Ch. 177; *Matter of Knickerbocker T. Corp. v. Sheila-Lynn, Inc.,* 172 Misc. 1015, affd. 259 App. Div. 992. See also: 56 Yale Law Jour. 605, 624, Apl., 1947; 15 Calif. Law Rev. 263 Mar., 1927; *Thellusson v. Rendlesham,* 7 H. L. Cas. 429, 430; *Lewis v. Branthwaite,* 2 B. and Ad. 437, 445).

D. Legal effect of retention of jurisdiction.

No man may be both accuser and judge (*Sharkey v. Thurston, supra; People v. Haas, supra*). Disqualification is not illusory. The statute should not be construed to defeat its purpose; nor may it be rationalized or oversimplified into a rule of procedure investing the Trial Judge with discretion to sit or not to sit (*Sharkey v. Thurston, supra,* p. 127; *People v. Patrick,* 183 N. Y. 52; cf. *Schneiderman v. U. S.* 320 U. S. 118, statement of Mr. Justice Jackson, p. 207). There is no *qua* prerogative (fol. 3416) involved. The Judge is not above the law. The statute is a substantive enactment and raises a jurisdictional barrier (*Wigand v. Dejonge,* 8 Abb. N. C. (N. Y.) 260; cf. *Zambetti v. Garton,* 113 N. Y. Supp. 804; *Snyder v. Massachusetts,* 291 U. S. 97, 105, 116).

Due process requires a judicial proceeding, not an assumption of authority (*McMaster v. Gould,* 240 N. Y. 379, 385; *Matter of City of Buffalo,* 139 N. Y. 422, 429, 430; *Wicks v. Monihan,* 130 N. Y. 232, 237, 238; *People v. Bork,* 96 N. Y. 188, 196; *People ex rel. Childs v. Extrady. Trial Term,* 228 N. Y. 463, 467; *Pennoyer v. Neff,* 95 U. S. 714, 733; *Twining v. New Jersey,* 211 U. S. 78, 110, 111; *Palko v. Connecticut,* 302 U. S. 319, 327; *Moore v. Dempsey,* 261 U. S. 86).

E. Right to trial by a competent court was abridged.

Disqualification of the trial judge left the Court without a constituent part in this case, the presiding judge (*People ex rel. Battista v. Christian*, 249 N. Y. 314, 319). The trial was a fiction and no trial at all (*Sharkey v. Thurston*, 268 N. Y. 123, 126, 127; *People ex rel. Battista v. Christian, supra*, p. 318; *People v. Rathbun*, 21 Wend. 509, 542). There was no one to preside, instruct the jury, receive the verdict and pass sentence, although it was passed (fols. 3473, 3474).

The trial judge was no less disqualified because he claimed lack of personal knowledge of the investigation of this case by his office or its result. Action by his staff is his own (*Keefe v. Third Nat. Bk. of Syracuse, supra*, p. 313; *Davis v. Seaward*, 85 Misc. 210, 222, 223; County Law, §§200 [4], 202; *Spielman Motor Co. v. Dodge*, 295 U. S. 89, 93; *Fellows v. Mayor*, 8 Hun 484).

From the foregoing cases (cited under C *supra*, Lack of Jurisdiction in County Court, pp. 15-16), in which the jurisdictional bar embodied in Section 14 of the Judiciary Law is applied, there emerges a manifest discrimination between them and the case at bar, where application thereof was refused. The action of the County Court was State action through its constitutional court (N. Y. Const., Art. 6, §11), affirmed by its highest court (*Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278; *Neal v. Delaware*, 103 U. S. 370, 385-389; *Yick Wo v. Hopkins*, 118 U. S. 356; *Virginia v. Rives*, 100 U. S. 313, 318-322; *Ex parte Virginia, Id.* 339, 344-349; *Cassel v. Texas*, dec. April 24, 1950). Therefore, on this phase of the case, there is lack of equal protection of the laws.

II.

The judgment of conviction rests upon perjury, coerced and knowingly used, and should not be permitted to stand.

A. Importance of the question.

Perjury affects and corrodes the conviction here. This Court is ever sensitive and vigilant to strike it down, for it destroys the sanctity and binding character of an oath, which is the last means of preserving truth and faith among fellowmen in courts of justice.

B. Perjury was committed by the witness Balog.

It is clear that recanting the recantation is material and necessary to conviction. In fact, it supplies the only evidence of, and connecting petitioner with, the reciprocal charges of filing and uttering the certificate (fols. 879-882, 938, 956-962, 7-16, 19-22). To put it in perspective, we must go back to Balog's halting, direct testimony, indicating the contest in the forum of his conscience (fol. 795). He was never asked on his direct examination whether the certificate was returned to him after he signed it. The State glossed it over thus (fol. 796):

> "Q. Do you remember the time of day that you came up with them? A. Yes, it was my lunch hour."

He was never asked on re-direct examination (fols. 908-913) (*sic*), to clarify (fol. 959) his free and uncoerced testimony given the same day (fols. 882, 743). Recalled the day following, April 27, 1948, upon the State's representation that it was to ask him about some checks (fols. 938-939), he was then asked what bears the hallmark of coercion, and the real purpose was then revealed for his re-

call (fols. 951-959). Refreshing the witness about checks was not the purpose, which the Court refused to allow although within §8-a of the Code of Criminal Procedure (fols. 951-954). The witness could not be called hostile or confused (fols. 952-954). He was then to give his *quid pro quo* for his promised immunity (fol. 3484), namely, to testify falsely as to filing and uttering the certificate so that conviction might be had.

C. Perjury was coerced and knowingly used by the State.

Balog had given his testimony the day before, freely, truthfully and not under coercion (882, cf. 795). Overnight, when he saw and talked with four members of the staff of the district attorney, he was informed that he was to be recalled (*sic*) "to clear up a point" (fols. 965-970, 974, 975). There can be no doubt that he was told just what he was to say. Clearly, then, knowledge by the State is spelled out that the testimony was perjury, and that it was knowingly used in the trial. Balog was not asked at the Yonkers inquiry in July, 1947, about filing the certificate (fols. 878, 3716). He testified before the Grand Jury in this case in October, 1947 (fol. 879).

Before appearing before the Grand Jury, he conferred with the district attorney, and his wife and his own attorney were also present at the conference (fols. 879-882). He testified that, at the conference, the district attorney gave him the information that he, Balog, filed the certificate (fol. 882). He made that statement his own except that he did not put it into direct discourse, but into indirect (fol. 882). That was not what the State wanted of him, they wanted the statement, direct from him. He even failed them at first (fol. 795) and then he gave up the

truth (fol. 882). That testimony upset the plan of the State. It was not touched upon on re-direct until the next day after the State had "refreshed" him. Then under coercion, he toed the mark set for him. (Wigmore on Evidence, 3rd ed., §§1128, 1129). It is to be noted that Balog did not waive immunity (fols. 882, 883). He felt the State had enough evidence to indict him, which he wanted to avoid, and the State shared his views (fols. 883, 3525, 3526).

With the truthful and uncoerced testimony before the jury, the case of the State had collapsed (*cf.* fols. 4062-4065). But the victory was to be achieved the next day albeit the baser factors would be exposed, the perjury. Overnight, the coercion began and the next day it bore fruit (fol. 959). It came out, it will be noted, in a great expostulation, an avalanche of words, few of which are responsive to the question (fol. 959). This did not just happen. It is not accidental nor a coincidence. It is a plan, frustrated at first, but now worked and its object achieved. He was conceded to be an accomplice by the State (fols. 3525, 3526). The Court declined to charge that he was (fols. 3691-3692, 3695-3698, 3708).

The protestations of the State and Balog, do protest too much (fols. 980-984). They fail to cover the perjury, its coercion and knowing use thereof to convict, the evidence of which on this record is clear.

His filing the certificate is a myth. When he signed it, he did not read it (fols. 791, 870). But if he filed it, he must have read it, otherwise he would not have come by the name of C. J. Arnold, placed upon the back thereof by the clerk under his office practice (fols. 10-12, opp. p. 4, fols. 816-820, 961-962). If his cross examination on April 26, 1948, is true (fol. 882 *cf.* fol. 795), and he is vouched for by the State who called him, then he is plainly a perjuror (*U. S. v. Norris,* 300 U. S. 564; *People v. Gillette,* 126 App. Div. 665; *People v. Markan,* 123 Misc. 689;

Penal Law, §§1620 [1], 1620-a, 1622, 1624, 1626, 1627, 1627-a). It must be borne in mind that the case of *People v. Glass,* 191 App. Div. 483, was decided in 1908, and could not arise now because of the additions to the perjury statute in 1936 of §§1627 and 1627-a. The *Gillette* case turned, not on the fact of perjury, but upon the privilege of silence under the New York constitution (Art. 1, §6). But the commission of perjury is what we are concerned with, not its prosecution. Where there is a law against perjury, that will suffice to vitiate the judgment (*Mooney v. Holohan,* 294 U. S. 103). Perjury clearly emerges here, even under the criteria of the State and corrodes the judgment (*Mooney v. Holohan,* 294 U. S. 103; *Pyle v. Kansas,* 317 U. S. 213; *Hysler v. Florida,* 315 U. S. 411, 413).

III.

Balog, chief witness of the State, was impeached in violation of the statutes, and is also an uncorroborated accomplice, all of which leaves the verdict unsupported by evidence on the charges of filing and uttering, and goes to his credibility on all counts of the indictment.

A. Importance of the question.

The true administration of the law and the safeguarding of the right to a fair trial.

B. There is no substantive evidence of guilt of filing and uttering under counts first and third.

Impeachment rests upon the factual basis argued in Point II, *supra,* and is bound up in the recanting of the recantation (fols. 957-959 *cf.* fols. 795, 882). From im-

peachment on, we come logically and naturally to complicity.

Substantive evidence of guilt was removed by impeachment of Balog (*People v. Hagedorny,* 272 App. Div. 830; *People v. Sellinger,* 265 N. Y. 149, 154; *Hanrahan v. N. Y. Edison Co.,* 238 N. Y. 194; and see cases cited under statutes involved, *supra,* pp. 5, 6). Notwithstanding its removal from the case, there can be no doubt upon this record that it was considered by the jury and applied as substantive evidence of guilt. Upon to the time of impeachment, the State's case had collapsed, and made dismissal of counts first and third mandatory as matter of law (fols. 2396-2402, 3332).

C. The impeachment in this case was in violation of the statutory methods prescribed therefor.

Under §§8-a and 343a of the Code of Criminal Procedure and Civil Practice Act, respectively, a prior consistent statement may be shown, provided it was made at a time when the witness was not actuated by motives to shield himself. It does not include statements made out of court and not under oath, which is the case of Balog (*People v. Katz,* 209 N. Y. 311, 338, *People v. Edwards,* 282 N. Y. 413, 416, *Robb v. Hackley,* 23 Wend. 50; *Conrad v. Griffey,* 52 U. S. 480, and cases cited *supra,* pp. 5, 6, under statutes involved; fols. 879-882). While the Court ruled out complicity entirely on the facts and law (3691-3698, 3708), and the connection of Balog with the charges here is the same thing as his complicity therein (*People v. O'Neil,* 109 N. Y. 251, 267), then it must follow that the impeaching testimony (fol. 959), was admitted under the addition to §§8-a and 343-a, *supra,* which makes the verdict contrary to and inconsistent with the charge, and shows that the jury considered the evidence substantively in reaching it.

Balog was not a hostile witness (fol. 953, *cf.* fol. 959) and was actuated upon the trial by motives no different from those that actuated him in July, 1947 (fols. 878, 896, Wigmore Op. Cit. Sup. §§1128, 1129), when he knew of the imminence of things to come and when he was represented by his own attorney (fols. 831-833, 878, 879-880, 884-896, 898-899, 901-906, 954, 960-962, 965). His motives had not changed at the time of trial, except that he tried hard at first, to live up to the sanctity and binding character of the oath he had taken (fol. 795, *cf.* fol. 882). The evidence was not substantive proof under the circumstances here (*Bullard v. Pearsall, People v. Robinson, Matter of Roge v. Valentine, supra,* and cases cited under statutes involved, *supra,* pp. 5, 6).

D. Lack of due process and denial of equal protection of the laws because of impeachment.

Impeachment clearly emerges, even under the criteria of the State, and the use of such testimony as substantive evidence of guilt to convict. That is lack of due process and denial of the equal protection of §§8-a and 343-a of the Code of Criminal Procedure and Civil Practice Act, respectively, and the case law of the State as to the use of impeaching testimony (Cases cited under statutes involved, *supra,* pp. 5, 6; *Pennenkamp v. Florida,* 328 U. S. 331, 345; *Chambers v. Florida,* 309 U. S. 227, 239-242; *Ashcraft v. Tennessee,* 322 U. S. 143, 154-156; *Malinski v. New York,* 324 U. S. 401, 404, 406).

E. Denial of the equal protection of the laws, Section 399 of the Code of Criminal Procedure.

Petitioner did not have a fair trial because, as shown above, the impeaching testimony was admitted under the shibboleth of clarification (fol. 959), meaningless in the

context, but affording a fulcrum of excuse upon which to introduce the perjurious recantation (fol. 959 *cf.* fols. 939, 958).

Introduction of the impeaching testimony (fol. 959), leaves, however, a train of fatal and grave illegality. It could be admitted in no event unless it was written and subscribed by the witness or made by him under oath (§§8-a and 343-a Code of Crim. Proc. and Civil Prac. Act, resp. and cases cited under statutes involved, *supra,* pp. 5, 6). He never made a consistent prior statement. The district attorney did (fols. 879-882; see cases cited under statutes involved, *supra,* pp. 5, 6). None of the requisites is present (fols. 954-959). That is the only exception to the rule mentioned in those statutes. But, when thus admitted in evidence, it stamps the witness indelibly as an accomplice, and then he must be corroborated (§399, Code Crim. Proc.). But the Court ruled as matter of law and fact that Balog is not an accomplice (3691-3698, 3708). But the law irrevocably stamps him as one (cases cited under statutes involved, *supra,* pp. 5, 6). Therefore, the testimony is in evidence as coming from an accomplice; and between the charge and verdict of conviction, there is an antithesis or inconsistency that should not be allowed to stand, for it infects the verdict. It is tantamount to further impeachment by the Court itself (fols. 957-959, 3691-3698, 3708). It is a negation of the rule admitting the testimony. It is respectfully submitted that the jury considered the impeaching evidence and used it to convict. Uncorroborated as Balog now is, he must, although he cannot, be corroborated under §399 of the Code of Criminal Procedure. As to his filing and uttering the certificate, of necessity, he could not be corroborated (*People v. O'Neil,* 109 N. Y. 251, 267). Nothing that depends upon his credibility can corroborate him. None of the records can corroborate him, including the Mari-

time certificate (Exhibit 3, fols. 3760-3762, 229; Exhibit 26, fols. 3850-3852, 1270; Exhibit 23, fols. 3832-3834, 784; Exhibit 12, fols. 3802-3804, 436; *People v. Nuzzo,* 294 N. Y. 227, 234-235; *People v. Kress,* 284 N. Y. 452, 459, *People v. Swersky,* 216 N. Y. 471, 476; fols. 4064-4065; *People v. O'Neil, supra*). Nor could Balog's payment of $100 at the time of executing the application for the Maritime telephone corroborate him (Exhibit 3, fols. 3760-3764, 246-248). That alone would make him an accomplice (*People v. Swersky, People v. Kress, supra*).

CONCLUSION.

The writ should issue.

Respectfully submitted,

FRANCIS A. McGURK,
Attorney for Petitioner.